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Judicial Notice: An Exercise in Exorcism

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JUDICIAL NOTICE: AN EXERCISE IN EXORCISM

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> Sint maledicti stantes & ambulantes, vigilantes & dormientes, ingredienties & egredientes. Sint maledicti manducantes & bibentes. Sit maledictus cibus eorum & potus. Sit maledictus fructus ventris eorum, & fructus terrae eorum. Sustineantque plagas Herodianas, quousque disrumpantur viscera eorum. Et cum Dathan & Abiron de terra viventium perditi, cum diabolo & angelis ejus perpetualiter damnati, maneant in poenis infernalibus sine fine cruciandi. Fiant etiam filii eorum orphani, & uxores eorum viduae. Nutantes transferantur filii eorum, & mendicent. Ejiciantur de habitationibus suis, omnibusque maledictionibus, quae in veteri vel novo testamento contineri videntur, maledicti & anathematizati subjaceant, quousque resipiscant, & nostrae vocationi & monitioni congrue satisfaciant.[1]

Any number of scholarly articles have been written about judicial notice over the years.[2] On several occasions magnificent

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1. Excommunication of certain invaders of Cluny property by Pope Benedict VIII in 1012.

> May they be cursed while they stand, while they walk, while asleep, while awake, as they enter, as they leave. May they be cursed while they eat, while they drink. May their food, as well as their water be cursed. May their proggeny, and the crops of their fields be cursed. May they endure Herodian deserts, wherever their insides be spilled.
> Even as Dathan and Abiron were damned from the land of the living, eternally cursed to the companionship of the devil and his archangels, may they linger in hellish punishments with endless torture.
> Also may their children become orphans, may their wives become widows. May their sons be reduced to trembling beggars. May they be cast out of their homes, and may they be held subject to all the curses which appear to be contained both in the old and the new testament, and whenever they come to their senses, may they satisfy our command and admonition to the letter.

Translated by Hiram Rosenberg. *See* 1 J. Goebel, Felony and Misdemeanor 263 n.163 (1937).

2. *E.g.*, Davis, *Judicial Notice*, 55 Colum. L. Rev. 945 (1955); Davis, *Official Notice*, 62 Harv. L. Rev. 537 (1949); McNaughton, *Judicial Notice—Excerpts Relating*

efforts have been made to codify judicial notice.[3] Excellent casebooks started years ago to introduce the student of law to evidence through the gambit of judicial notice, and this practice continues still.[4] Ever since beginning to study evidence myself in 1953, the topic, judicial notice, has held a fatal fascination for me. Gradually, however, the devil of doubt has with increasing volume whispered in my ear that judicial notice is an illusion. Like all worshippers disillusioned to find their idol has feet of clay, I feel the need forevermore to exorcise judicial notice from my system. Nay, what follows is an effort to exorcise judicial notice from the law of evidence and to cast this demon into utter darkness.

Not so very long ago, say 1953 when I was first exposed to the law of evidence, law students could learn the rules of law with some sense of Linus-blanket security. There were, for example, no warranties implied either in a deed[5] or a lease[6] relative to the physical quality of the estate being transferred. Claims for harm inflicted upon persons by defects in rented dwellings turned upon negligence law, applicable even then only if the case could be brought within one of the four classic exceptions to the cardinal principle of caveat emptor.[7] The notion that a manufacturer could

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to the Morgan-Wigmore Controversy, 14 Vand. L. Rev. 779 (1961); Morgan, *Judicial Notice,* 57 Harv. L. Rev. 269 (1944); Roberts, *Preliminary Notes Toward a Study of Judicial Notice,* 52 Cornell L.Q. 210 (1967); Comment, *The Presently Expanding Concept of Judicial Notice,* 13 Vill. L. Rev. 528 (1968).

3. In order they are: Model Code of Evidence, Rules 801-06 (1942); Uniform Rules of Evidence, Rules 9-12 (1953); Proposed Federal Rules of Evidence, Rule 201, 56 F.R.D. 183, 201 (1972).

4. *Compare* E. Morgan & J. Maguire, Cases on Evidence, ch. 1 (1934), *with* J. Maguire, J. Weinstein, J. Chadbourn & J. Mansfield, Cases and Materials on Evidence, ch. 1 (6th ed. 1973).

5. *See* Smith v. Tucker, 151 Tenn. 347, 362, 270 S.W. 66, 70 (1925), where the court stated:

> Whatever may be the reason, no case can be found in the books where the vendor has been held liable in damages to the vendee, or to third persons, for personal injuries arising from defects in the premises.

But see Schipper v. Levitt & Sons, Inc., 44 N. J. 70, 207 A.2d 314 (1965).

6. *See* Campbell v. Holding Co., 251 N.Y. 446, 448, 167 N.E. 582 (1929), where the court stated:

> It is a familiar rule that a lessor of a building is not liable for injuries to the lessee, or others upon the premises in the right of the lessee, resulting from a structural defect existing when the lessee took possession. . . .

Accord, Bottomley v. Bannister, [1932] 1 K.B. 458 (C.A. 1931).

7. *See* Sargent v. Ross, 308 A.2d 528, 531 (N.H. 1973):

> [A] landlord is now generally conceded to be liable in tort for injuries resulting from a defective and dangerous condition in the premises if the injury is attributable to (1) a hidden danger in the premises of which the landlord

be held liable on negligence grounds despite the absence of privity with an injured consumer was "modern" thinking,[8] whilst the invocation of res ipsa loquitur had a certain radical flair associated with it.[9] Schools were still segregated legally,[10] illegally obtained evidence was used in state courts[11] and the judges knew very well that it was not the function of judges to involve themselves in the political thicket of apportionment controversies.[12] Come to think of it, 1953 was a long time ago when measured in terms of how much since then the law's conventional wisdom has undergone pronounced change.

In 1953, moreover, when the case method of instruction still prevailed, facts tended to be taken for granted in the law schools.[13] Discussion centered upon appeals and whether or not the trial judge had applied the correct law.[14] Judicial restraint was the order

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but not the tenant is aware, (2) premises leased for public use, (3) premises retained under the landlord's control, such as common stairways, or (4) premises negligently repaired by the landlord. . . .

In *Sargent*, the New Hampshire court discarded caveat emptor, along with the four exceptions thereto, and simply held that "landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm. . . ." *Id.* at 534. Read *in pari materia* Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

8. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). *But see* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

9. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

10. *See* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

11. Wolf v. Colorado, 338 U.S. 25 (1949), *overruled* by Mapp v. Ohio, 367 U.S. 643 (1961). But *cf.* United States v. Calandra, 414 U.S. 338 (1974).

12. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946), *overruled in principle by* Baker v. Carr, 369 U.S. 186 (1962), and *overruled in fact by* Wesberry v. Sanders, 376 U.S. 1 (1964).

13. This, of course, was never admitted until recently "clinical" education came into vogue. For "official" versions of what law school was then all about, *compare* E. Morgan, Introduction to the Study of Law, ch. VII, entitled "How to Read and Abstract a Reported Case" (1926), *with* K. Llewellyn, The Bramble Bush, ch. IV, entitled "This Case System: Precedent" (1930).

14. Goodhart, *Case Law in England and America,* in Essays in Jurisprudence and the Common Law 50, 69-70 (1931):

> But the American law school does not teach American law, there is no such law. "The national law school," Judge Pound has said, "teaches 'general legal principles' which are assumed to be uniform, although state rules vary." The method is primarily the method of comparative law . . . . The teacher must guide the student in his choice between conflicting cases, and, in doing so, he tends to lay down a principle himself by which to test the cases. . . . The English teacher emphasizes what the judge has said: the American professor explains what the judge should have said.

of the day,[15] stare decisis and even English precedents counted for a great deal and the law was widely heralded as a deductive science. In conflict of laws, for example, lex loci delicti lived an unquestioned existence,[16] the rule having been so often repeated that it had all the trappings of a conditioned response.[17] And this really was what law school was all about, the programming of future lawyers and judges to react uniformly to certain stimuli so that given certain facts, the law machine would react in a predictive manner and certainty would obtain in the law. The case system simply reinforced this belief in rules when each one had to be acquired at considerable personal sacrifice in classrooms conducted as cockpits.

A grotesque machine was at the heart of this matter, for this is what the common law had become by 1953. In its formative periods, our legal system digests the facts giving rise to the dispute easily enough, the problem being to promulgate the correct law to resolve the dispute. The correct law really depends upon the cultural, social, economic, and intellectual assumptions of the judges. Thus *Brown v. Kendall,*[18] linchpin in the whole canon of negligence law, really turned upon the then recently popular notion that no one should be made liable without fault.[19] Law is created out of can't helps, the facts of the case, and the available

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15. Students taking constitutional law in 1953 all knew about Ashwander v. TVA, 297 U.S. 288, 346-48 (1936), where Mr. Justice Brandeis, in a concurring opinion, wrote the first law in a nutshell when he itemized the grounds by which the Court might excuse itself from facing a constitutional question. Well known to law students, the case tended to be ignored by casebook compilers because it gave the whole game away.

16. *See* American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). *But see* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

17. *Compare* Roberts, *A Rule is a Rule Because it is the Rule: Intellectual Crisis in Conflict of Laws,* 9 Vill. L. Rev. 200, 200-03 (1964), *with* Webb, *Conflict in Conflicts—Vested Rights Versus Proper Law: An English Don Reads Babcock,* 9 Vill. L. Rev. 193, 194-96 (1964).

18. 60 Mass. (6 Cush.) 292 (1850). *See also* Fowler v. Lanning, [1959] 2 W.L.R. 241 (Q.B.).

19. *See* Gregory, *Trespass to Negligence to Absolute Liability,* 37 Va. L. Rev. 359, 365 (1951). American judges in the first half of the nineteenth century "disliked the imposition of liability without fault and reacted against any manifestation of this notion. . . ." Why? Because

> our judges believed that the development of this young country under a system of private enterprise would be hindered and delayed as long as the element of chance exposed enterprisers to liability for the consequences of pure accident, without fault of some sort. . . .

Id.

law rules in just that descending order.[20] Once reduced to an opinion, however, the rule of law comes first, the facts next and, if mentioned at all, the presuppositions behind the result a poor third. Thence the learning process takes over and rules become paramount, as does the yearning for certainty. In time, since law is now learned, a similar dispute can easily be resolved simply by applying "the rule". The crunch comes when the presuppositions of society have changed so radically that to blindly apply "the rule" demands that the law make an ass of itself.[21] Then the reformation of the rules has to commence all over again.

Internally, moreover, the courts behave according to certain housekeeping rules, these being the rules of procedure and evidence. Thus, in 1953, a less than creative year in the history of the common law, if a question of law arose at trial, it was the judge's job to answer it. If it was a serious point affecting the result of the case, he would be reversed on appeal for giving the wrong answer. Thus a question of law is a question for judges to answer and to which there exists but one right answer. What about the facts giving rise to the lawsuit in the first place? Whether A hit B, or was drunk, or did post an acceptance—these facts had to be found true either by the judge sitting alone as trier-of-fact or by the jury. Whether a question of fact existed itself was a question of law, because judges were disciplined not to let plaintiffs reach the jury unless evidence sufficient to justify a verdict for plaintiff had been produced. Positing, however, a real donnybrook pro and con over the facts giving rise to the dispute, then a question of fact existed which the trier-of-fact had to resolve. Peculiarly enough, given such a case, no appeal lay whichever way the trier-of-fact came down as between plaintiff and defendant. Put more bluntly, a question of fact is one to which there are two right answers.[22]

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20. *See* Green, *Tort Law Public Law in Disguise*, 38 Texas L. Rev. 1 (1959).

21. *E.g.*, Humber v. Morton, 426 S.W.2d 554, 561 n.7 (Tex. 1968):

> In the vendor-builder situation, Professor Roberts seems inclined to agree with Mr. Bumble's estimate of the law and points out that when caveat emptor is retained with regard to sale of new houses, the law seemingly concerns itself little with a transaction which may and often does involve a purchaser's life savings, yet may afford relief by raising an implied warranty of fitness when one is swindled in the purchase of a two dollar fountain pen. . . .

22. *Compare* Morgan, *supra* note 2, at 269: "The judge has exclusive authority to determine the tenor and applicability of rules of law," *with* Cheetham v. Piggly Wiggly Madison Co., 24 Wis. 2d 286, 290, 128 N.W.2d 400, 402 (1964): "When a jury

The fly in this ointment was that certain facts might be so patently obvious that they fairly cried out for only one right answer. Suppose, for example, a contract case turned on the single issue of whether or not the instrument dated January 31st was in fact an unenforceable Sunday contract? Whether or not January 31st fell on a Sunday is a fact readily verified by recourse to sources of indisputable accuracy.[23] It would reduce trials to the theatre of the absurd to let the jury deliberate and possibly, for whatever reason, come in with an obviously wrong answer. Thus, as a matter of law some questions of fact are decided by the judge at trial, and it is an error of law for him not to do so.[24] These questions of fact answered by the judge *qua* law giver and not by the trier-of-fact are the raw materials out of which the doctrine of judicial notice has been constructed.

In practice, "judicial notice problems" arise around the periphery of facts actually giving rise to the dispute. Typically, for example, a defendant in a paternity case will seek to introduce the results of a negative blood test.[25] Clearly it is a matter for the jury to assay whether they believe the test was properly and fairly administered: this much turns on the credibility of the technicians. In letting in the testimony, however, the trial judge has ruled that it is relevant because, if the technicians are being truthful, then scientifically defendant cannot be the father. But can plaintiff then debate with experts the principle behind the test? Yes, on the offer of proof itself, the validity of the principle is arguable in front of the bench, because relevancy hinges on it. Once the judge rules that the principle is valid, however, the plaintiff cannot have the jury pass again on the validity of the principle. Juries deliberating over the truth or falsity of the postulates of science would again threaten to make trials look silly. Thus once the judge rules, his ruling is a law ruling, even though the question appears to be one of fact, and the ruling is final.[26]

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verdict is attacked we inquire only whether there is any credible evidence that, under any reasonable view, supports the verdict. . . ."

23. C. McCormick, Evidence § 330, at 763-66 (2d ed. 1972); Morgan, *supra* note 2, at 288-89.

24. Hoyt v. Russell, 117 U.S. 401 (1886).

25. *E.g.*, Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949). *See generally* Note, *Evolving Methods of Scientific Proof*, 13 N.Y.L.F. 679 (1968).

26. *See* Morgan, *supra* note 2, at 279: "If taking judicial notice of a matter means that it is indisputable, it must follow that no evidence to the contrary is admissible. . . ." *See also* Keeffe, Landis & Shaad, *Sense and Nonsense About Judicial Notice*,

This finality became a crucial issue when the effort was made to codify judicial notice in the Uniform Rules of Evidence in 1953.[27] There did exist language in both Thayer and Wigmore indicating that judicial notice was merely a device to expedite trials and that, if a fact question seemed fairly obvious, the trial judge could excuse its proponent from producing evidence and simply tell the jury to assume it unless the other side rebutted it.[28] Thus in our paternity case, if the judge thought that more and more scientists were coming to accept the blood test principle, he could let the results in for what they were worth without an extensive preliminary hearing on the question, leaving it to the opponent to continue the debate before the jury. This would have made judicial notice a distant relative of a presumption.[29] This is precisely what the Uniform Rules forbade.[30] Simply, court rooms are not forums in which to rehearse scientific debates in front of juries. Only if prevailing scientific conventional wisdom sustains the blood test principle are the results relevant.[31] Absent that fact, they do not come in. Given that fact, they do come in, but further debate about the principle itself is foreclosed. Judicial notice, once taken, is final.

This treatment of judicial notice is internally consistent because whilst the fact judicially noticed is put beyond debate, only

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2 Stan. L. Rev. 664, 668 (1950): "The better view would seem to be that a fact, once judicially noticed, is not open to evidence disputing it. . . ."; McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 321-22 (1952).

27. See note 3 *supra*.

28. 9 J. Wigmore, Evidence § 2567(*a*), at 535 (3d ed. 1940):

> That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the Court *assumes* that the matter is so notorious that it will not be disputed. But the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable. . . .

Accord, J. Thayer, A Preliminary Treatise on Evidence at the Common Law 308-09 (1898).

29. Morgan, *supra* note 2, at 286:

> It is fortunate that thus far the courts have not enmeshed problems of judicial notice in the language of presumptions; to do so would open another legal Pandora's box. . . .

30. Uniform Rules of Evidence, Rule 11 (1953).

31. *See, e.g.*, State v. Damm, 62 S.D. 123, 136-37, 252 N.W. 7, 12 (1933), where the trial judge did not err refusing to admit blood test results in a rape trial because the principle behind the tests was not then accepted. Thereafter, the principle became accepted into the canon of scientific truths. However, on rehearing, the new wisdom helped this defendant not one iota since *when* the trial judge excluded the results, the point at which legal error was posited, the theory was not accepted. State v. Damm, 64 S.D. 309, 318, 266 N.W. 667, 671-72 (1936).

facts notorious to all and sundry within the jurisdiction or verifiable facts—*i.e.*, true facts—can be noticed.[32] This internal consistency reveals, however, the real thrust behind this approach. The whole idea was to limit severely the instances when trial judges could take judicial notice. It was designed to put an end to the practice of judges deciding cases on the basis of their personal knowledge of parochial facts. In a case where the imposition of strict liability hinged on the question of whether defendant's establishment was a hotel, no longer could the trial judge volunteer: "I know the Von Glahn Hotel as well as the witness does himself; I will give you a ruling now [that] it is a hotel."[33] No longer, in the theory at least, would a trial judge take judicial notice that the luncheonette stool from which plaintiff fell "had been in the same condition for at least fifteen years . . . without any incidents having taken place, so far as we know, to have indicated that it was a source of danger."[34]

Discipline then was the key,[35] judges being told to keep their hands off questions of fact unless these facts were indisputably true. Appellate judges, moreover, were instructed to discipline themselves in similar fashion.[36] But this whole approach was itself a response conditioned upon events which had caused enlightened liberal opinion to agree upon the need to rein in the judges. The Sacco-Vanzetti trial was still very much on peoples' minds and, by and large, conventional wisdom had it that undisciplined judges catalyzed by prejudices, had perpetrated an outrage.[37] Concomitantly, judicial restraint had become a liberal orthodoxy after the early days of the New Deal when the unreconstructed Court, applying personal prejudices and cracker barrel wisdom, had threatened to bring about a confrontation with the executive branch which might conceivably have over-politicized the judicial system.[38]

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32. Read *in pari materia* Uniform Rules of Evidence, Rules 9 & 11 (1953). *See, e.g.*, Phelps Dodge Corp v. Ford, 68 Ariz. 190, 196, 203 P.2d 633, 638 (1949):

> A fact of which a court may take judicial notice must be indisputable. This being true it follows that evidence may not be received to dispute it.

33. Gibson v. Von Glahn Hotel Co., 185 N.Y.S. 154, 155 (App. Term, 1st Dep't 1920).

34. Beychok v. St. Paul Mercury Indem. Co., 119 F. Supp. 52, 54 (W.D. La. 1954). *See generally* C. McCormick, *supra* note 23, § 329, at 760-63.

35. Note the increment of scholasticism on the opening page of Morgan, *supra* note 2.

36. Uniform Rules of Evidence, Rule 12 (1953).

37. *See, e.g.*, Morgan, Book Review, 47 Harv. L. Rev. 538, 546-47 (1934) (reviewing Ehrmann: The Sacco-Vanzetti Case and the Morelli Gang). *See also* G. Joughin & E. Morgan, The Legacy of Sacco and Vanzetti 177 (1948).

38. *Compare*, in order, A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936), *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

Burns Baking Co. v. Bryan[39] was a typical illustration of how opinionated judges could demolish social legislation. Bread used to be sold by weight, but the baked loaves expanded in eccentric fashion so it was possible to mistake a puffy, somewhat overweight pound loaf for the next larger size, a fact some unscrupulous bakers were not loath to exploit to their advantage. The Nebraska legislature then decreed that bread had to be manufactured in standard weight sizes a half pound apart, a large enough differential so that there could be no mistakes about relative sizes. The bakers protested that the law was terribly unfair because the weight of the baked loaf changed after baking since moisture evaporated, a fact which could trigger unintended violations of the law. The answer advanced was that wrapping the bread in wax paper solved their objection, an answer the Nebraska courts accepted. Not so Mr. Justice Butler who proceeded to articulate his opinions about bread:

> It is a wholesome article of food and . . . bakers have a right to furnish it to their customers. The lessening of weight of bread by evaporation during 24 hours after baking does not reduce its food value. It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation . . . .[40]

So much then for how Mr. Justice Butler would have voted had he been a member of the Nebraska legislature.

The question before the Court, however, was whether the measure was an unreasonable expedient in light of the widespread practice of deception. This posed no problem because:

> There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a nine and a half or a ten ounce loaf for a pound (16 ounce) loaf . . . and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception. . . .[41]

Reasonableness having become a question of fact, the state lost. As a practical matter, therefore, the constitutionality of the measure, seemingly a question of law, came to turn on the ineptitude

39. 264 U.S. 504 (1924).
40. *Id.* at 516.
41. *Id.* at 517.

of the state's counsel in getting the requisite proof of the environment into the record at trial.

The philosophy thus far articulated about judicial notice would seem to indicate that Mr. Justice Butler had no right to interpolate his personal notions about bread and the Nebraska bread making scene into the equation. But wait a moment. Mr. Justice Butler, his unreconstructed brethren and the very idea that there existed substantive due process soon disappeared from the judicial scene.[42] Around the axiom of judicial restraint, a moderate approach was taken when it came to due process reviews of state legislation enacted pursuant to the police power.[43] First, was the enactment designed to achieve an objective cognizable as an appropriate justification to exercise the police power; that is, was it a measure calculated to regulate the public health, safety, morals or general welfare? Second, in light of the data at hand, could a legislature still beholden to reason have adopted the means they had to achieve their objective?[44]

Operating from New Deal hindsight, the only issue in *Burns* was whether the measure was a reasonable response in light of the problem perceived to exist. This was precisely the point in *Bururns* to which the dissenting Mr. Justice Brandeis had addressed himself, reciting page after page of extra-record data as to how widespread was the shortweight problem and, how perforce, the act was reasonable in light of the problem perceived.[45] Pursuant to the New Deal era's conventional wisdom, Mr. Justice Brandeis exemplified "the correct" approach. But here the genius of Professor K. C. Davis emerged when he pointed out that, *per* the evolving rules of judicial notice, Mr. Justice Brandeis was just as out of bounds as was Mr. Justice Butler.[46] The "good" Justice, after all, was taking note of facts which were not indisputably true!

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42. See note 38 *supra.*

43. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952):

> Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . .

44. *E.g.*, Berman v. Parker, 348 U.S. 26 (1954).

45. Burns Baking Co. v. Bryan, 264 U.S. 504, 517-34 (1924) (Brandeis, J., dissenting).

46. Davis, *An Approach to Problems of Evidence in the Administrative Process,* 55 Harv. L. Rev. 364, 403-05 (1942); Davis, *A System of Judicial Notice Based on Fairness and Convenience,* in Perspectives of Law 85 (R. Pound, E. Griswold & A. Sutherland eds. 1964):

> The whole vital and basic idea of the Brandeis brief and all that goes with it, including research by counsel and by judges into factual materials,

Professor Davis, in fact, quarreled *in toto* with the Uniform Rule matrix, going so far as to return to the Thayer-Wigmore praxis that trial judges could judicially notice facts on balance likely true, waiving formal proof to save time.[47] This meant, of course, that the truth of the fact noticed was not foreclosed, but was open to rebuttal. Judicial notice again appeared to look like a presumption. Be that as it may, Professor Davis became famous for drawing the distinction between "adjudicative facts" and "legislative facts",[48] largely through McCormick's original hornbook.[49] Thus a new conventional wisdom crystallized about judicial notice which limited the doctrine to adjudicative facts,[50] but maintained the Uniform Rule's insistence that judicially noticed adjudicative facts involved only indisputable facts and, once notice was taken, they were binding on the jury as a matter of law.[51]

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is totally at war with the Morgan-McNaughton conception that facts to be noticed must be indisputable and that noticed facts are not rebuttable.

Davis continued:

> The false idea is prevalent among some teachers of evidence law that in constitutional litigation social facts are used only to show that legislation has a rational basis under the due process clause. . . . The *Burns* case is an example of extra-record factual assumptions *against* constitutionality under the due process clause. . . .

Id. at 85 n.36.

47. Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *supra* note 46, at 78-79:

> Thayer gave a beautiful answer in a single sentence: "[T]aking judicial notice of a fact is merely presuming it, i.e., assuming it until there shall be reason to think otherwise. . . ."

48. The distinction was first advanced in Davis, *An Approach to Problems of Evidence in the Administrative Process*, *supra* note 46, at 402-03. Adjudicative facts concern the circumstances which gave rise to the lawsuit, helping to explain who did what, when, where, how, and with what motive and intent. Legislative facts, on the other hand, consist of those which assist the court in making a determination of law and policy. They include, for example, those pertinent social and economic facts which test the validity and applicability of existing law and form the rational basis for the promulgation of new law. Davis, *An Approach to Problems of Evidence in the Administrative Process*, *supra* note 46, at 402-03.

49. C. McCormick, Evidence § 329, at 705 (1954).

50. *See id.* § 329, at 707:

> Judicial notice in the field of "legislative" facts is an important avenue for more informed consideration by our courts in policy-making of the contributions of the social, economic, and physical sciences. No rigid requirement of certainty should curb it, but appropriate safeguards should be developed. . . .

51. *Id.* § 330, at 711:

> [J]udicial notice of indisputable facts rests on the same policy as the practice of summary judgments. Accordingly, the weight of reason and the prevailing authority support the view that a ruling that a fact will be judicially noticed precludes contradictory evidence and requires that the judge instruct the jury that they must accept the fact as true.

Meanwhile, the Uniform Rules also encapsulated within the doctrine questions of law.[52] To put the best face on it, there do exist in history reasons why "law" got mixed up with judicial notice.[53] In their days of glory, English courts sitting in London heard disputes arising from all parts of the Empire, which according to *lex loci delicti,* for example, necessitated applying foreign law. Since sources of this law were not readily available and various languages were involved, the judges shifted the burden to the parties to sort out the true state of the foreign law by simply making it a fact to be pleaded and proved. Expedient enough for the Georgian King's Bench, the American states duplicated the rule with regard to each others' laws. All manner of reforms have since occurred, however, leading to a growing recognition that, howsoever onerous, it is the judges' job ultimately to sort out the law to apply to the dispute at hand.[54] Concomitantly, and more to the point, it has been recognized that this whole problem is not one of evidence, *i.e.*, handling facts, but a procedural one.[55]

Thus far we have seen judicial notice encapsulated in a rigid grid in the Uniform Rules, but then witnessed both K.C. Davis' attack thereon, along with the growing awareness that knowledge of law had no proper place within the parameters of judicial notice. Recently then it has been a case of back to the drawing board with yet another attempt to rationalize judicial notice. The recently proposed Federal Rules of Evidence illustrate a tactical retreat.[56] That is to say, judicial notice is confined to adjudicative facts; legislative facts and the content of law having been put beyond the

52. Uniform Rules of Evidence, Rule 9 (1953).

53. *See* C. McCormick, *supra* note 23, § 335, at 777-78.

54. *E.g.*, Uniform Judicial Notice of Foreign Law Act. *See* C. McCormick, *supra* note 23, § 335, at 778-79.

55. C. McCormick, *supra* note 23, § 335, at 782.

56. Proposed Federal Rules of Evidence, Rule 201, 56 F.R.D. 183, 201 (1972).

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A judge or court may take judicial notice, whether requested or not.

(d) When Mandatory. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

pale. Even so, within the realm of adjudicative facts, the Uniform Rule philosophy lives on. That is, to be capable of being judicially noticed, a fact still has to be notoriously known to be true throughout the jurisdiction or capable of being verified from the conventionally described sources of indisputable accuracy. Again, once noticed, the fact becomes law and is no longer subject to question by the trier-of-fact.

What has occurred, however, still posits the 1953 notion that courts "resolve" disputes in three senses. First, within rules of evidence they maintain a forum where litigants differing as to who did what to whom can get a socially determinative resolution of their dispute. Second, the judge can resolve differences about legal rights by looking up the law and officially pronouncing the correct law. Third, the courts can oversee the legislature in a constitutional function and, *qua* looking up law, verify the authority of the legislature to proceed, and also, by verifying the pseudo-factual milieu in which the legislature functions, assay the reasonableness of its behavior. The judge is a functionary, programmed to behave himself. Not only is law a neutral set of principles, but the judge, too, is a neuter. But what happens when, having entered another era of formative law-making by the judges, one takes seriously efforts to codify judicial notice?

First, of course, part of the problem is easily disposed of by noting that judges legislate so they can employ facts, not necessarily true, but which reasonably reflect considered thinking about the problem. Typically cited as illustrative of this is *Hawkins v. United States*[57] in which the Court refused to depart from the old rule that one spouse cannot testify against the other. Why? Because such testimony would "be likely to destroy almost any marriage."[58] Maybe, if there were a marriage worth saving after the spouse volunteered to testify, the idea would be true. Clearly this notion is not indisputable, but it's just another legislative fact so it's not within the formal system.

What then is within the system? Posit a defendant on trial on a single larceny count, which requires proof he stole merchan-

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(f) Time of Taking Notice. Judicial notice may be taken at any stage of the processing.

(g) Instructing Jury. The judge shall instruct the jury to accept as established any facts judicially noticed.

57. 358 U.S. 74 (1958).

58. *Id.* at 78. Again, the example was proposed by Davis, *A System of Judicial Notice Based on Fairness and Convenience, supra* note 46, at 83.

dise worth at least $50. The prosecution's witnesses have testified that the scoundrel made off with a ten pound bar of gold, but the prosecutor never introduced testimony concerning the object's value. Here we have an adjudicative fact whence, it being easily verified what the price of gold is, the judge could instruct the jury and be done with it. This being a criminal case, however, constitutional niceties intervene to prevent using this hypothesis as a good example.[59] Then what is one? The Sunday contract example noted earlier went out with the horse and buggy. The question whether blood tests or now spectrograms are scientifically valid governs whether testimony about the results of such tests will be admitted; that is to say, they are problems of relevancy and not facts directly pertaining to the actual "who did what to whom"—the event being litigated.[60] In fact, none of the evidence casebooks used today contain a single adjudicative fact example that cannot be rationalized just as easily on relevancy grounds. Bluntly put, the greatest advance along the lines of codifying evidence would be by deleting at once even the rump of judicial notice still surviving in the proposed Federal Rules or any other rules of evidence.

To the extent that the regimen of judicial notice was ever intended to restrain judges from surveying the passing scene when they came to question the social relevance of current rules, it has

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59. *See, e.g.*, State v. Main, 94 R.I. 338, 180 A.2d 814 (1962); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951). "Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute," the Proposed Federal Rules of Evidence do not distinguish between criminal and civil cases. Advisory Committee's Note (g), Proposed Federal Rules of Evidence, Rule 201, 56 F.R.D. 183, 207 (1972).

60. A voiceprint is only as persuasive as the credibility of those who employed the technology. If one believes that juries in their awe of "science" are apt to overlook this point, then traditional notions of legal relevancy sustain the policy decision to exclude this kind of evidence as being more harmful than it is worth. By invoking judicial notice, a good excuse is had to exclude voiceprints since the principle is not universally accepted. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). But this approach forecloses any possibility of using the technique until it is universally accepted, even granted a trier-of-fact sophisticated enough to give the tests their proper weight. *But see* United States v. Wright, 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967). Comment, *The Status of Voiceprints as Admissible Evidence* 24 Syracuse L. Rev. 1261, 1265-66 (1973). Consequent upon the *Frye* Rule,

> a party seeking to introduce evidence based upon a scientific technique first must establish its general scientific acceptance before it will be admitted. . . . This approach represents a restrictive view with respect to the admissibility of evidence . . . .
>
> Voiceprint evidence may also be excluded on the grounds of irrelevancy. Relevancy represents a liberal approach to the issue of admissibility of evidence, in which a court will examine the relationship of the evidence

always been a failure, whether in Alabama[61] *circa* 1827 or New Jersey[62] *circa* 1965. Once the socio-economic environment threatens to render application of any rule asinine, it will be changed. Rigid adherence to doctrinal judicial notice actually reflects, more likely than not, something which is "primarily a political question rather than a judicial question."[63] If true, this explains why people take seriously a doctrine shot full of incongruities. Faith in the doctrine does not rest upon its empirical foundations in the decided cases but rather is rooted in loyalty to the mood music subliminally transcending the whole doctrine. That is to say, absent certainty, change not. Howsoever apt as a liberal doctrine at the apogee of the New Deal, this notion amounts even to a conservative heresy in an age when, if it is not soon made responsive, the traditional rule of law shall disappear under the rising tide of anarchy. The times are not propitious in which to codify conventional wisdom. Rather, we must turn our attention to today's needs. Even The Trimmer, after all, recognized that: "The angry Buzz of a Multitude is one of the bloodiest Noises in the World."[64]

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offered to the issues presented in the case in terms of certain policy considerations. . . .

61. Gillespie v. Dew, 1 Stew. 229 (Ala. 1827). Since, unlike England, land here in the outback was not likely occupied by a bailiff, trespass was allowed to be brought on the basis of mere "constructive possession".

62. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). Modern mass builders were seen to be manufacturers subject to implied warranty lore rather than real estate vendors shielded by caveat emptor.

63. This is a play on the 1958 conference of the state chief justices and their *Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions*, Harv. L. Rec. Oct. 23, 1958, at 1, col. 4.

64. The Complete Works of George Savile, First Marquess of Halifax 219 (W. Raleigh ed. 1912). The Marquess (1633-1695) was commonly referred to as the "Trimmer" by his contemporaries, the connotation being that "he trimmed his sails to the varying breezes of opinion . . . ." *Id.* at vii.